THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Delivered on : 06.08.2007

\+ **OMP 299/2006**

UNION OF INDIA ...Petitioner

- versus -

SHRI B.P. SHARMA & ANOTHER ...Respondents

Advocates who appeared in this case:
For the Petitioner : Mr Rao Vijay Pal.
For the Respondents : Mr Vivekanand.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in Digest?

BADAR DURREZ AHMED, J (ORAL)

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 in respect of the Award dated 24.03.2006 passed by the respondent No.2. Although various grounds have been taken for challenging the said Award, the main grounds taken by the petitioner are that claim was time barred and that the claim was also barred under Clause 25 of the agreement entered into between the petitioner and the respondent No.1.

2. It appears that preliminary objections had been raised with regard to the claim being time barred and also being barred under clause 25 of the said agreement. The said preliminary objections were disposed of by an order dated 16.12.2003 passed by the learned Arbitrator. However, since the petitioner felt aggrieved by the rejection of the objections, a review application was filed for reconsideration. Without going into the objections as to whether an Arbitrator ought or ought not to consider an application for review, the learned Arbitrator decided to re-hear the matter and consider the objections once again. The same were disposed of by an order dated 27.07.2004. Both the objections were addressed and answered in the following manner:-

> "The respondent has not denied or disputed either in replication to the reply of the claimant or in its written submissions, the legal position as stated by the counsel for the claimant with reference to provisions of Section 28(b) of the Indian Contract Act and the judgments cited by the claimant that the provision of clause 25 is void to the extent of waiving or barring the claims if arbitration is not invoked within 90 days of the final bill. No other judgment to the contrary has been brought to my notice by the respondent. So far as the judgments cited by the counsel for the respondent are concerned the same are not applicable to the fact of the case in hand as in the case of Pandit Munsi Ram Vs. DDA the reference to arbitration was rejected not because of the arbitration having not been invoked within 90 days but because the petition was filed after 5 years from the date of payment of the final bill. In this case the admitted date of payment of final bill is 31.03.1999 whereas the claimant has invoked arbitration on 25.03.2002 which is well within three years from the date of payment of final bill. Though in objection dated

11.11.2003 the respondent had alleged that the copy of the letter dated 25.03.2002 was received on 01.04.2002 but nothing has been produced on record to substantiate the same. To the contrary R-1 dated 25.03.2002 filed by the respondent with letter dated 11.11.2003 shows that the letter invoking arbitration was received by the respondent vide Dy. No. 376 dated 27.03.2002. Even if the period of 3 years is counted upto 27.03.2002 from 31.03.1999 it is well within three years. Further even as per the allegations of the respondent itself the time extensions were decided on 14.10.1999 and 29.10.1999 vide R-20 and R-22 and it is only thereafter that the security deposit was disposed of and further it is admitted by the respondent that last payment by way of payment of escalation under clause 10 CC was made on 17.01.2000. The counsel for the claimant has supplied a copy of judgment in the matter of Motor General Finance Vs. T. K. Gorge reported in 2002(1) ALR-284 (Delhi) wherein the Hon'ble Judge has observed that the payment or part payment tantamount to acknowledgment of the amount and thus the period of limitation would be running from the date when last payment is stated to have been made. In the replication as well as written submission the respondent has made an endeavour to plead that the final bill was accepted on 09.09.1998 and thus the date of final bill be treated as 09.09.1998. I have seen the record filed and produced before me. One page of the measurement book has been filed as R-19 by the respondent which bears the signatures of the claimant at the top of the page. After this endorsement and signatures subsequently lot of recoveries and etc. have been shown. This shows that as on the date of signing of the MB by the claimant the final bill was not ready and the recoveries / deductions were made later on. Further the learned counsel for the claimant has supplied a judgment in the matter of Unity Engineers Vs. ITPO reported in 2001 (IV) AD- Delhi-528 wherein it has been observed by the Hon'ble High Court that the signatures of the petitioner obtained on the measurement book cannot by any stretch of imagination be deemed as intimation as provided in the agreement to

> the effect that the final bill was ready. Otherwise also R-19 the page of the measurement book does not bear the signatures of the Engineer-in-charge/ Executive Engineer passing the bill for payment. Evidently the bill has been passed and finalized by the respondent much after 09.09.1998. Thus under the circumstances I find the date of the final bill as 31.03.1999 when the payment was made. So far as the another judgment of the Hon'ble Supreme Court relied upon by the respondent is concerned it relates to the period before amendment in Section 28 was brought by the Amending Act of 1997. The Hon'ble Supreme Court has not discussed the effect of the amended provisions of Section 28(b) of the Indian Contract Act and as already observed by me the respondent have not brought to my notice any other law on the point of 90 days holding otherwise than what was held by the Hon'ble High Court in the three judgments relied upon by the counsel for the claimant."

3. With regard to the question that the claim was time barred under Clause 25, I find that the learned Arbitrator has correctly relied upon the provisions of Section 28 (b) of the Indian Contract Act, 1872 and has held that the said Clause 25 of the agreement would be void to the extent that it extinguishes the rights of the respondent No.1 upon the expiry of the period of 90 days prescribed therein. With regard to the claim being time barred, the learned Arbitrator has also examined the question of limitation and has taken the date of last payment as the starting point of limitation and found that the claim, which preferred within a period of three years thereof, was within time. I see no infirmity with the Award passed by the learned Arbitrator so as to warrant

interference under Section 34 of the said Act.

This petition is dismissed.

BADAR DURREZ AHMED
(JUDGE)

August 06, 2007
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